Soh Chun Seng v CTOS-emr Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–597 OF 2003
TENGKU BAHARUDIN SHAH, APANDI ALI AND ZAHARAH IBRAHIM JJCA
19 NOVEMBER 2011

B

C

Tort — Defamation — Libel — Credit information provider (respondent) published report of bankruptcy petition filed against appellant — Report outdated — Petition struck off years before publication date of credit report — Whether report defamatory of appellant — Whether disclaimer in report that information contained therein not reflective of current status of matter absolved respondent of liability — Whether appellant proved damages suffered due to libel

D

The appellant, a businessman, was a director of several companies. One of the companies of which he was part-owner requested the respondent — which provided credit information to clients who subscribed for its services — to do a credit check on the appellant. The request was made by the appellant's brother to test the efficiency and accuracy of the respondent's services. The credit check report ('P2') prepared by the respondent dated 24 April 1997 stated that a bankruptcy petition ('the petition') had been filed in court against the appellant five years earlier and was fixed for hearing on 4 May 1993. The appellant said P2 gave its readers an erroneous status of his affairs as the petition was struck off by the court on 23 September 1993. The appellant sued the respondent in the High Court for aggravated and exemplary damages and injunctive relief for libel claiming P2 had injured his reputation and gave the inference, inter alia, that he was a bankrupt, was untrustworthy, dishonest, financially unsound and unfit to be a businessman and that the companies under his management were not stable. In support of his claim for damages, the appellant claimed that as a result of the publication of P2 his application for a credit card was turned down while an application by one of his companies for financial facilities was rejected. The respondent also failed to heed a request contained in the appellant's solicitor's letter to delete the contents of P2, apologise for the error committed and pay damages. The respondent admitted receiving the solicitor's letter but when it asked for evidence that the petition was indeed struck off, there was no reply. The respondent said until it received the solicitor's letter it did not know the petition had been struck off. The respondent then published a second credit check report dated 20 September 1997, tendered at the trial as exhibit 'D14', containing a remark that the petition had been struck off as the debt was fully settled on 23 September 1993. The respondent denied the information in P2 was false or defamatory and that it was obtained from a notice advertised in a local daily. The High Court

E

F

G

H

I

dismissed the appellant's claim holding the contents of P2 were not defamatory as P2 contained a disclaimer heading stating that the information in the document was not confirmation of the current status of the petition; that it was only taken from a notice published in a local daily and that a reader wishing to know of the current status of the matter had to check with the parties concerned. The appellant appealed against the decision to the Court of Appeal.

Held, allowing the appeal in part:

(1) D14 contained a remark that the petition against the appellant had been struck off as the debt was fully settled on 23 September 1993. In other words, at the time P2 was published, the appellant was no longer facing the creditor's petition. D14 was therefore an admission by the respondent that the original credit information in P2 was factually neither true nor accurate. Both in law and in fact, the credit information published in P2 was defamatory of the appellant (see para 20).

(2) The headnote in P2 that sought to avoid liability for the reliability of the credit information contained therein did not, on the facts of the case, absolve the respondent from responsibility for its mistakes (see para 21).

(3) There was no evidence to support the allegations of damages particularised in the statement of claim. The appellant had failed to prove he had suffered damages as a result of the libel (see lpara 27).

[Bahasa Malaysia summary

Perayu, seorang ahli perniagaan, merupakan seorang pengarah untuk beberapa buah syarikat. Salah satu syarikat yang mana dia merupakan pemilik bersama meminta responden — yang memberikan maklumat kredit kepada pelanggan yang melanggan perkhidmatannya — untuk melakukan pemeriksaan kredit ke atas perayu. Permintaan tersebut telah dibuat oleh abang kepada perayu untuk menguji kecekapan dan ketepatan perkhidmatan responden. Laporan pemeriksaan kredit ('P2') yang disediakan oleh responden bertarikh 24 April 1997 menyatakan bahawa suatu petisyen kebankrapan ('petisyen') telah difailkan di mahkamah terhadap perayu lima tahun yang lalu dan telah ditetapkan untuk perbicaraan pada 4 Mei 1993. Perayu berkata P2 memberikan pembacanya status yang salah mengenai hal ehwalnya kerana petisyennya telah dibatalkan oleh mahkamah pada 23 September 1993. Perayu menyaman responden di Mahkamah Tinggi bagi ganti rugi teladan dan keterlaluan dan relief injunksi bagi libel dengan mendakwa bahawa P2 telah merosakkan reputasi dan memberikan inferens, antara lain, bahawa dia adalah seorang bankrap, tidak boleh dipercayai, tidak jujur, tidak mempunyai kewangan yang kukuh, tidak layak untuk menjadi seorang ahli perniagaan dan bahawa syarikat-syarikat di bawah pengurusannya tidak stabil. Dalam menyokong tuntutannya untuk ganti rugi, perayu mendakwa bahawa akibat hasil penerbitan P2 permohonannya untuk mendapatkan kad kredit telah

ditolak manakala permohonan oleh salah satu syarikat bagi kemudahan kewangan juga telah ditolak. Responden juga gagal mematuhi permintaan yang terkandung dalam surat peguamcara perayu untuk membuang kandungan P2, memohon maaf atas kesalahan yang dilakukan dan membayar ganti rugi. Responden mengakui menerima surat peguamcara, tetapi apabila ia meminta bukti bahawa petisyen tersebut sememangnya dibatalkan, tiada jawapan yang diberikan. Responden menghujahkan bahawa sehingga ia menerima surat peguamcara itu tidak tahu petisyen tersebut telah dibatalkan. Responden kemudiannya menerbitkan laporan pemeriksaan kredit kedua bertarikh 20 September 1997, yang dikemukakan pada perbicaraan tersebut sebagai ekshibit 'D14', yang mengandungi kata-kata bahawa petisyen tersebut telah dibatalkan kerana hutang tersebut telah diselesaikan sepenuhnya pada 23 September 1993. Responden menafikan maklumat dalam P2 adalah palsu atau fitnah dan bahawa ia telah diperolehi daripada notis yang diiklankan dalam sebuah akhbar tempatan. Mahkamah Tinggi menolak tuntutan perayu dengan memutuskan kandungan P2 bukanlah fitnah kerana P2 mengandungi satu tajuk pengecualian yang menyatakan bahawa maklumat dalam dokumen tersebut bukanlah pengesahan status semasa petisyen tersebut; bahawa ia telah hanya diambil dari suatu notis yang disiarkan dalam akhbar tempatan dan pembaca yang ingin tahu status semasa perkara tersebut perlu menyemak dengan pihak yang berkenaan. Perayu merayu terhadap keputusan Mahkamah Rayuan.

Diputuskan, membenarkan sebahagian rayuan:

(1) D14 mengandungi kata-kata bahawa petisyen terhadap perayu telah dibatalkan kerana hutang tersebut telah diselesaikan sepenuhnya pada 23 September 1993. Dalam erti kata lain, ketika P2 diterbitkan, perayu tidak lagi menghadapi petisyen pemiutang. Oleh itu, D14 adalah suatu pengakuan oleh responden bahawa maklumat kredit asal dalam P2 adalah dengan nyata tidak benar dan tidak tepat. Dalam kedua-dua undang-undang dan fakta, maklumat kredit yang disiarkan dalam P2 adalah fitnah perayu (lihat perenggan 20).

(2) *Headnote* dalam P2 yang mengelakkannya daripada liabiliti untuk kebolehpercayaan maklumat kredit yang terkandung dalamnya tidak, dalam fakta-fakta kes ini, membebaskan responden daripada tanggungjawab atas kesalahan-kesalahannya (lihat perenggan 21).

(3) Tiada bukti untuk menyokong dakwaan ganti rugi yang dinyatakan dalam pernyataan tuntutan tersebut. Perayu telah gagal membuktikan bahawa dia telah mengalami kerugian akibat daripada libel (lihat perenggan 27).]

Notes

For a case on libel, see 12 *Mallal's Digest* (4th Ed 2011 Reissue) para 821.

Cases referred to

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 46, CA (refd)
Jones v Skelton [1963] 3 All ER 952, PC (refd)
Stubbs, Ltd v Mazure [1920] AC 66, HL (folld)
Stubbs, Ltd v Russell [1913] AC 386, HL (folld)

Legislation referred to

Civil Law Act 1956 s 3
Courts of Judicature Act 1964 s 69

Appeal from: Suit No S2–23–35 of 1997 (High Court, Kuala Lumpur)

Raymond Mah Carmen (Teh Poh Luan with him) (Mah Weng Kwai & Associates) for the appellant.
Haris Ibrahim (Ashok Kandiah and Frank Wong with him) (Liza Chan & Co) for the respondent.

Apandi Ali JCA:

INTRODUCTION

[1] The appellant ('the plaintiff') who is a businessman had filed an action against the respondent ('the defendant') claiming for damages and injunctive relief based on the tort of libel. The alleged libelous statement was over the publication of a credit check report dated 29 April 1997 by the defendant, at the request of Audio One Entertainment Sdn Bhd.

[2] After a full trial, the High Court dismissed the plaintiff's claim with costs. On appeal before us, this court allowed the plaintiff's appeal in part, with costs, but nevertheless upheld the dismissal of the plaintiff's claim for damages.

[3] We now give our reasons for the said decisions.

BACKGROUND FACTS

[4] The facts of the case are well set out in the learned High Court judge's grounds of judgment, which reads as follows:

> The Plaintiff is, at all material times, a businessman and director of several companies known as the Audio One Groups of Companies. The Plaintiff alleged that by a credit check report dated 29.4.1997 undertaken by the Defendant at the request of a customer of the Defendant, the Defendant had reported, printed and published or caused to be reported, printed and published defamatory words of and concerning the Plaintiff. The report states, inter alia, as follows:

CREDIT SEARCH REPORT DATED 29-04-97 Done by: SABILA

IMPORTANT: This report is confidential. Reproduction is prohibited. The report only indicated the information was published in the relevant source. *It is NOT intended as confirmation of the 'current status' of the case.* For the case's current stats, your further probe with the relevant parties is required …

INFORMATION AS PER CTOS DABASE ARE AS FOLLOWS:

===

BANKRUPTCY — CREDITOR'S *PETITION ISSUED*

SPECIAL REMARK:

NAME: SOH CHUN SENG

I/C/NO: 4695233/541023106353

REMARK:

EXPARTE: AMERICAN EXPRESS - JLN SULTAN ISMAIL, KL

BANKRUPTCY NO. D5-29-5830-92

NOTICE DATE:

HIGH COURT KUALA LUMPUR

PETITION DATE: 301092 STAR 01044493

HEARING DATE: 040593

ORDER DATE:

ANNUALMENT/DISC: AMOUNT:

SOLCTR: ISHARIDAH HO CHONG & MENON LOT 903, 9TH FLOOR 3 WISMA HLA JALAN RAJA CHULAN 50200 KUALA LUMPUR REF: IHCM/A3/92/NA/NA TEL: 03-2420022/2447975.

[5] The plaintiff contends that the report published by the defendant has caused injury to the plaintiff's reputation as it infers to anyone who has read the report that:

(a) the plaintiff is an undischarged bankrupt;

(b) the plaintiff has been adjudicated a bankrupt;

(c) the plaintiff is an insincere person and is untrustworthy;

(d) the plaintiff is not fit to be a businessman and/or is not an honest and financially sound director; and

(e) by reason of the matters state in (a) (b) (c) and (d) above, the companies under the management of the plaintiff qua director are neither stable nor sound.

[6] The plaintiff pleads that the said credit check report does not reflect the true situation in which the Kuala Lumpur High Court had, on 23 September 1992, in the Bankruptcy Case No D5–29–5830 of 1992 ordered that the creditor's petition dated 30 October 1992 presented against the plaintiff (which was the subject matter of the contents of the said report) be struck off.

[7] By way of support for his claim to be entitled to exemplary or aggravated damages, the plaintiff complained that his application to Citibank for a credit card in or about December 1993 was rejected on account of the publication by the defendant of the credit check report. Further, the plaintiff also complains that an application by Audio One Entertainment Sdn Bhd for an industrial line-purchase facility of RM3m to Hong Leong Finance Bhd on or before December 1996, was not considered an account of the same publication by the defendant. The plaintiff further pleads that by a letter dated 14 May 1997 the solicitors for the plaintiff had written to the defendant requesting that the information relating to the plaintiff in the credit check report be deleted, the defendant apologies and pay damages; but the defendant failed, neglected and refused to do so.

[8] The defendant, on the other hand, was incorporated on 13 October 1994 as Crisis Management Sdn Bhd and commenced its operation on 1 April 1995. The defendant then changed its name to CTOS-emr Sdn Bhd on 15 February 1996. The defendant is in the business of providing information collated and compiled in its database from public records such as government gazettes; newspapers and data from searches conducted at the registry of business and the Companies Commission of Malaysia for its clients quick and easy reference and access for a fee. The defendant admitted that at the request of Audio One Entertainment Sdn Bhd, the defendant had, on 29 April 1997, furnished to Audio One Entertainment Sdn Bhd the said credit check report based on the information collated and compiled in its database relating to the plaintiff, which was obtained from *The Star* newspaper dated 1 April 1993. The defendant states that the information furnished to Audio One Entertainment Sdn Bhd in respect of the plaintiff was correct in every respect, to wit, that a creditor's petition dated 30 October 1992 was presented against the plaintiff at the instance of American Express (M) Sdn Bhd vide Kuala Lumpur High Court Bankruptcy No D5–29–5830 of 1992, and a notice of the same was advertised in *The Star* newspaper by way of substituted service. The defendant denies that the information furnished was false or defamatory and was capable of bearing the meanings as pleaded by the plaintiff. The defendant admits receiving the letter dated 14 May 1997 from the plaintiff's solicitors and states that the same was replied by a letter dated 19 May 1997 wherein the plaintiff's solicitors were requested to furnish evidence that the creditor's petition in the Bankruptcy Case No D5–29–5830 of 1992 was struck off on 23 September 1993. This, the plaintiff or his solicitors has failed to do. The defendant states

that prior to 19 May 1997 the defendant had no knowledge that the said creditor's petition has been struck off. Premised on the pleadings, the defendant raised three specific defences to the plaintiff's claim, namely:

(a) the words complained of do not bear the defamatory imputations as contended by the plaintiff;

(b) the words complained of are in substance and in fact true; and

(c) the words complained of were published on an occasion of 'qualified privilege'.

[9] However, given the evidence that has emerged in the course of the trial in this action, the defendant chosed not to pursue the third defence on 'qualified privilege'.

ISSUES BEFORE THE COURT

[10] From the pleadings filed by both parties and from the evidence adduced at the trial, and from the fact that it is not disputed that the alleged credit check report pertaining to the plaintiff as per exh P2, was indeed published by the defendant, the issues before the court became narrower. The only issues to be determined are that:

(a) whether the words published are defamatory?; and

(b) whether the plaintiff had suffered damaged as a result of the libel?

DECISION BY THE HIGH COURT

[11] The learned trial judge had dismissed the plaintiff's action on the sole reason that the contents of exh P2 are not defamatory. The learned judge had at length in his grounds of judgment approached the issue by looking 'not only the actual words, but the context of the words;' and also on the basis of the impact of the words to the mind of the ordinary, reasonable, fair minded reader. To our mind such approach is correct, as far as to determine the question of fact.

[12] However, the learned judge went on further to say that the publication of the alleged libelous words were not defamatory as it comes with a preceding rider or proviso in the form of a heading which reads as follows:

> IMPORTANT: This report is confidential. Reproduction is prohibited report only indicates the information was published in the relevant source. It is not intended as confirmation of the current status of the case. For the case's current status, your further probe with the relevant parties is required.

[13] The learned judge refers to the heading as the 'header' in his grounds of judgment. On his reliance on the header, the learned judge wrote at length, as follows:

> The header makes it plain to any reasonable reader that the information that appears below it, is not intended as confirmation of the current status of the creditor's petition and that if the reader wishes to know the current status, a check with the parties concerned is necessary. The header makes it plain that it only serves to confirm that the information appearing below it had been obtained from a source, ie *The Star* newspaper.
>
> No reasonable reader of exh P2, having noted the contents of the header, could conceivable reach the conclusion as suggested by the plaintiff that the information appearing below it meant that the plaintiff was an undischarged bankrupt, or had been adjudicated a bankrupt, or was insincere and untrustworthy; was not fit to be a businessman, not honest or not financially sound. Certainly no reasonable reader could conclude that the information appearing below the header might touch on the reputation of companies under the management of the plaintiff, save and except by an unreasonable stretch of imagination.
>
> If the meanings suggested by the plaintiff are the result of a fanciful imagination of the reader rather than a reasonable, natural and ordinary reading of the whole of exh P2 the defendant cannot be held to account for the some. The learned author of *Gatley*, at p 88, put it this way:
>
> > Although the judge does not have to be satisfied that the defamatory meaning contended for by the plaintiff is more probable than an alternative, innocent meaning, yet he should 'reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation', and 'it is not enough to say that by some person or another the words might be understood in a defamatory sense'. Mere conjectures which some person might possibly though unreasonably form are not enough o leave the case to the jury.
>
> The court is satisfied that by the contents of the header, the defendant has in fact asserted that the information that appears below the header is not intended to mean any of the imputations that the plaintiff alleged. To borrow the words of His Lordship Justice Kinnear, in the House of Lords case of *Stubbs, Ltd v Russell* [1913] AC 386 at p 392 '… what it is intended to represent is explained in a head-note, which must be read along with it in order to make it convey any intelligible meaning,' and when it is so read it is impossible that any reasonable man should collect from it the libelous imputation alleged.

[14] Relying on the House of Lord's decision in *Stubbs, Ltd v Russell* [1913] AC 386 and applying s 3 of the Civil Law Act 1956, the learned trial judge followed the ratio decidendi in that English case; namely on the effect of the preceding head-note, which qualified the information published, hence the

plaintiff's claim was dismissed on the sole ground that it was not defamatory. A

FINDINGS OF THIS COURT

[15] As mandated by s 69 of the Courts of Judicature Act 1964, we heard this appeal by way of re-hearing. On that footing, we made our own analysis and assessment of the pleadings and all the evidence as contained in the appeal records. B

ON THE FIRST ISSUE OF WHETHER THE WORDS PUBLISHED WERE DEFAMATORY C

[16] Since this is an action on the tort of libel, our approach on the first issue of whether the words published were defamatory, is to take the first step of analysis, ie to see whether the words complained of are capable of bearing a defamatory meaning. This is a question of law. After ascertaining that question of law, we then proceeded with the next step, ie to see whether the words complained of are in fact defamatory. This is a question of fact. We are guided on this line of approach by the Court of Appeal decision in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 46; which adopted the reasoning in the English case of *Jones v Skelton* [1963] 3 All ER 952. D E

[17] In our analysis, in order to ascertain whether the words published in exh P2 are capable of bearing a defamatory meaning, we need to consider the nature and purpose of exh P2 vis-it-vis the business of the defendant in providing such information for a fee. The defendant is a service provider of credit information to clients who subscribed for its services. From the evidence adduced, it is our finding that the defendant as a provider of credit information, the defendant was providing information which will lead to the assessment of the financial reputation and creditworthiness of the particular subject matter of the information. F G

[18] As the information on the plaintiff in exh P2 relates to the issuance of a creditor's petition, it undoubtedly amounts to credit information that will lead any reasonable reader to be suspicious of the creditworthiness of the plaintiff. H

[19] From the factual matrixes of the case, we noted that exh P2 was published on 29 April 1997 and that as contained in it, the petition was filed some five year earlier namely on 30 October 1992 and of which the hearing date was fixed on 4 May 1993. Subsequently, four months after the publication of P2, a new credit information was issued by the defendant and produced as exh D14, which reads as follows: I

A CTOS CREDIT SEARCH REPORT DATED 20-09-97

Done by:STEVEN

INFORMATION PROVIDED BY YOU:

REPORT NO: 242916

B

ACCOUNT NO: DEMO DEMO ACCOUNT

NAME: SOH CHUN SENG

I/C NO YR REF:

C IMPORTANT: This report is confidential. Reproduction is prohibited. Report only indicates the information was published in the relevant source. It is NOT intended as confirmation of the 'current status' of the case. For the case's current status, your further probe with the relevant parties is required. In cases of 'NAME MATCH', 'ALIAS MATCH', or 'NEAREST NAME MATCH', you should seek an identity

D confirmation from the relevant parties. INFORMATION AS PER CTOS DATABASE ARE AS FOLLOWS:

===

1) BANKRUPCY — CREDITOR'S PETITION ISSUED

E SPECIAL REMARKS: CREDITOR PETITION STRUCK OFF. DEBT FULLY SETTLED ON 230993

NAME: SOH CHUN SENG (NAME MATCH ONLY)

I/C NO: 4695233 / 541023106353

F REMARK: CP STRUCK OFF. DEBT FULLY SETTLED 230993

ADDRESS: 7, JLN 109, KEPONG BARU, KL

FIRM:

G EXPARTE: AMERICAN EXPRESS - JLN SULTAN ISMAIL, KL

BANKRUPTCY No: D5-29-5830-92

HIGH COURT KUALA LUMPUR

NOTICE DATE:

H

PETITION DATE: 301092

STAR 010493

HEARING DATE: 040593

I ORDER DATE:

ANNULMNT/DISC:

AMOUNT: 6,666

SOLCTR; ISHARIDAH HO CHONG & MENON

LOT 903, 9™ FLR

REF: IHCM/A3/92/NA/NR/NA

WISMA HLA

TEL: 03-2420022 / 2447975

JALAN RAJA CHULAN 50200 KUALA LUMPUR

…

[20] This credit search report (D14) was published on 20 September 1997 and it contained a remark which indicated that the creditor's petition against the plaintiff has been struck off as the debt was fully settled on 23 September 1993. In other words at the material time when the first credit search report was published on 29 April 1997, the plaintiff was no longer facing the said creditor's petition. It is our judgment, therefore, that exh D14 is an admission by the defendant that the original credit information in exh P2 was factually neither true nor accurate. Corollary to this, it is clear that the information in P2 is capable of bearing a defamatory meaning.

[21] On the issue of the preceding head-note that tantamount to a rider that ought to negate any liability on the reliability of the credit information in exh P2, we are of the view that such preceding head-note does not, on the facts of the case, absolve the defendant from responsibility for its mistakes. Our view is fortified by another House of Lords' decision, which distinguished the case cited and relied upon by the learned trial judge, ie *Stubbs, Ltd v Russell* [1913] AC 386. We relied on a subsequent House of Lords case of *Stubbs, Ltd v Mazure* [1920] AC 66, where Lord Viscount Finlay wrote:

> It was contended by the solicitor-general for Scotland on behalf of the appellant that the appeal must be allowed on the ground that the averments are not relevant and the decision of your Lordships' House in *Stubbs, Ltd v Russell* [1913] AC 386; [1913] SC (HL) 14 was pressed upon us. The facts and the allegations in that case were similar to those in the present case, with the very material exception that the innuendo was different; being that the pursuer was unable to pay his debts.
>
> In my opinion the averments of the pursuer are relevant and were properly admitted to proof. In other words I think that the entry in the Gazette of which he complained and the allegations in the pleadings are such as to support the innuendo alleged, and Lord Anderson so found at the trial. There was evidence that the entry had been understood in this sense and that damage to the pursuer had been thereby caused. The object with which the list is published is that tradesmen and merchants may have material for forming a judgment whether credit may safely be allowed in any particular case. There was evidence that the list is known as the 'black list' and that the appearance of the name of any person in it is calculated to excite suspicion. The appellants relied on the Note prefixed to the entry in the Gazette to the effect that in no case does publication of the decree imply inability to pay on the part of

any person named. But without imputing insolvency such a publication might suggest that the person named was a bad payer and that enquiry should be made before giving credit to him. If the entry is capable of being read in this defamatory sense, it is no answer to an action for a false allegation that such an entry had appeared in the court books, to say that it is stated in the Note that the publication of the decree does not impute insolvency. It may be defamatory without imputing actual insolvency. There was evidence to support the pursuer's averments, their sufficiency was a matter for the Lord Ordinary by whom the case was tried without a jury, and there is no ground for interfering with his conclusion or for treating the damages as excessive.

Very great pains were taken in the judgments in *Stubbs, Ltd v Russell* [1913] AC 386; [1913] SC (HL) 14 to show that the decision was confined to the innuendo there alleged, namely, that the pursuer 'was unable to pay his debts and was in insolvent circumstances and in pecuniary embarrassment and was avoiding payment of a pecuniary embarrassment and was avoiding payment of a just debt'. The decision proceeded on the ground that such an imputation of insolvency was negative by the note. That note was in the same terms as in the present case, but the innuendo is different. Lord Kinnear's judgment is rested on the ground that the imputation charged was one of insolvency, and that the Note in the publication complained of expressly stated that insolvency was not to be inferred. Lord Shaw of Dunfermline makes it quite clear that this was the ground, and the only ground, for the decision. He says Tor … such a decree might pass for a large variety of reasons, none of which would injuriously affect the reputation or trade of the debtor. One quite natural interpretation of the entry would be that the alleged debtor had forgotten to pay the small sum sued for. Another reason might be that he was — having certain opinion as to the injustice of the claim or the full amount of it — determined not to pay except under force of law. A third reason for such a decree might be that he was absent and knew nothing about the summons. And a fourth that he was a person given to refusing or delaying to pay his debts in ordinary and proper course. The last … might possibly affect the reputation and credit of the alleged debtor. And I am not prepared to say that there may not be circumstances in which injury, more particularly to a trader in humble and struggling circumstances, would not be produced if the erroneous entry had been taken up in the last-mentioned sense. Such a person might never have been in a court, might always have met his obligations with regularity, might be in a critical stage in the development of his business, and, as at present advised, I should not say that it was a strained construction to put upon the entry that it was reasonably likely to imply that he was given to or had begun the practice of refusing or delaying to make payment of his debts and that the public or those dealing with him had understood it in that sense. The position taken up by the respondent, the pursuer in the action, is that he has put forward in issue the erroneous entry with a much more sweeping and serious innuendo. That innuendo is that the entry 'falsely and calumniously represented that the pursuer was unable to pay his debts.' He has, in short, taken upon himself the burden of saying that the entry of a decree in absence having passed against him for 9l. odd was equivalent to or implied an imputation of his insolvency. After much consideration, I am of opinion that this innuendo imports into the erroneous entry more than it can reasonably bear.' The Lord Chancellor, Lord Haldane, expressed his concurrence with the judgments of Lord Kinnear and of Lord Shaw.

Lord Shaw's judgment seems to make it quite clear that the appellants' argument proceeds on a misunderstanding of *Stubbs, Ltd v Russell* [1913] AC 386. The innuendo charged in the present case is practically in the same terms as the innuendo suggested by Lord Shaw as being one which might be supported by the publication of such an entry. The contention of the solicitor-general that Lord Shaw's observations must be considered as referring only to the case of a trader in humble and struggling circumstances appears to me to be quite untenable. Such a set of circumstances might render damage more likely to ensue from such a statement, but can have no bearing upon the question of relevancy.

I am, therefore, of opinion that the decision in *Stubbs, Ltd v Russell* [1913] AC 386 has not the effect contended for by the appellants, and indeed a careful examination of the judgments shows that they are rather against than in favour of the appellants in the present case. It is one thing to impute insolvency; it is another thing altogether to say, as is said here, that the pursuer was given to or had begun to refuse or to delay to make payment of his debts, and the statement in the note as to insolvency not being imputed by the publication of the entry does not rebut the possibility that the entry might be understood as importing a slighter degree of embarrassment, an imputation which might nevertheless prejudicially affect the trader. For these reasons, I am of opinion that this appeal should be dismissed with costs.

[22] In the same case, Lord Viscount Cave held that Stubbs Limited could not hide behind such head-note to avoid responsibility. He wrote:

The portion of the above headnote which is relied upon in the present case is the statement that in no case does publication of a decree imply anything more than the fact that the entry published appeared in the court books. If this means that readers of the Gazette are invited to rely upon the statement that the entry has appeared in the court books as a true statement of fact and to draw all proper inferences from it, then the headnote does not assist the appellants. But if it means that readers are not to draw from the fact stated any inference prejudicial to the credit of the person named, then I do not think that serious reliance can be placed upon a warning so contradictory to the nature of the publication itself. The Gazette is published and circulated in order that its readers may draw inferences as to the credit of the traders named; and it appears to me to be futile to suggest that the publishers of such a Gazette are protected by a mere warning that no such inference is to be drawn. So to hold would be in effect to hold them immune from responsibility for their mistakes, however serious the consequences which may ensue.

[23] Interestingly, Lord Show of Dunfermline, who sat in the earlier case of *Stubbs Ltd v Russell*, subsequently held that the 'cautionary note' only applies to true statements and not to false statement. He wrote:

My Lords, further reflection, however, inclines me to add one remark as to the heading or cautionary notes placed by Messrs Stubbs at the top of their lists of such decrees. I think that I must amplify one observation made in *Russell* upon that subject. These notes, my Lords, are notes applicable to true statements and not to false statements. The assertion is made that the entry which has been advertised is an

A extract from the court books, that it is a publication of a decree, and that it represents neither insolvency nor anything else than the bare record. I do not think it is legitimate to apply any such cautionary preface to what was not a true but a false assertion and the statement as to what publication of the decree might imply seems to have no application to a case in which no such decree was granted. In short, unless this view be taken, very serious consequences might arise, and harm to business and reputation might result, when a newspaper is made, whether inadvertently or in the way of business, the vehicle for launching upon the public a false and calumnious statement. The limit of protection for both parties are found in the law itself; and it is not open to the author or circulator of a calumny to say to the public that they must take up a falsehood in one sense and no other, and by doing so to close the door to all remedy. A conditioned or specialised slander of that kind is not known to the law; the results of a calumnious falsehood arise from the impression which it — all of it, including reservations, cautions and all the rest — makes upon the minds of the readers, an impression which may be quite apart from any artificial restriction which the author of the falsehood sought to impose. It is for those results that the author or promulgator of the libel is responsible. The law itself is not inconsiderate of all the legitimate excuses for error in such publications, but it cannot accept the will of the author of a wrong as the measure of the consequence of that wrong.

From the facts of the case and applying the above law as cited above, we conclude, on the first issue, that in law and fact the credit information published in exh P2 is defamatory of the plaintiff.

ON THE SECOND ISSUE OF WHETHER HAS SUFFERED DAMAGES

[24] From the plaintiff's pleadings, the plaintiff claimed that he had suffered loss based on facts of which the particulars were as itemised in para 10 of the statement of claim, which reads as follows:

10 Plaintif selanjutnya akan bergantung dengan fakta-fakta yang berikut bagi menyokong tuntutan ganti rugi teladan atau teruk.

BUTIR-BUTIR

(a) Plaintif telah memohon kemudahan kad kredit daripada Citibank pada atau sebelum bulan Disember 1993, tetapi telah ditolak permohonannya akibat daripada penerbitan laporan pemeriksaan kredit yang dilakukan oleh Defendan itu.

(b) Permohonan syarikat Plaintif, iaitu Audio One Entertainment Sdn. Bhd. untuk satu Kemudahan Sewa-Beli Perusahaan berjumlah sebanyak Ringgit Malaysia Tiga Juta (RM3.0 Juta) daripada Hong Leong Finance Berhad pada atau sebelum bulan Disember 1996 untuk memperkembangkan perniagaan Plaintif itu juga telah tidak dapat dipertimbangkan sebagai akibat daripada penerbitan laporan tersebut.

[25] Treating this appeal as a retrial, upon perusal of the notes of evidence we cannot help noting the manner as to how exh P2 came into the hands of the

plaintiff. It came into existence at the request of Audio One Entertainment Sdn Bhd (a company partly owned by the plaintiff). That request was made by a brother of the plaintiff, namely PW2, Soh Choon Meng. It is also interesting to note that the purpose of the request was just to test the efficiency of the defendant's services! This can be seen in PW2's evidence (at p 326 of the appeal records) which reads as follows:

Q16: You have included the Plaintiff's name in the list of inquires, why was a search carried out on your brother Soh Chun Seng?

PW2: I include my brother's name in the list to *see how efficient and correct C-Tos are for the purpose of their service.*

Q17: Is there any reason that would have led to the inquire about Soh Chun Seng that you did a search on Soh Chun Seng?

PW2: When apply for loan, financial institution would always ask if I of the Director a bankrupt.

[26] Further down the evidence, it dawned upon us that the action for damages arose from an ill-feeling that materialised from a telephone conversation between PW2 and a person working for the defendant, over the incorrect information in P2. This can be seen in PW2's evidence (at p 327 of the appeal records) which reads as follows:

Q23: After receiving the report, what did you do?

PW2: I took the report and went to see my brother to inform him of the report.

Q24: Thereafter what happened?

PW2: I had discussion with my brother and after the meeting, my brother asked me to refer to C-Tos. I made a call to C-Tos, a person by the name of Ken Chong answered the call.

Q25: What transpired in the call?

PW2: I told him that the information in the report is wrong and he replied me saying that the report is from public domain.

Q26: Did you ask him to do anything about the report?

PW2: Yes. I asked him to take it out because it is wrong *and he in very unfriendly manner* saying that the report is public document.

Q27: During telephone call, did C-Tos ask you to provide any document to show inaccuracy or incorrectness of the report?

PW2: No.

Q28: Did you volunteer to submit any document to show incorrectness of the report?

PW2: No, I did not forward any documents to C-Tos as *I find them very unfriendly* since they said the report is from public source.

A

Q29: What happened after the telephone call?

PW2: I went to see my brother and told him that C-Tos not very Co-operative & my brother informed to see lawyer to handle this case.

Q30: Did you appoint a firm of solicitors to handle this matter?

B

PW2: Yes.

[27] From the evidence adduced at the trial, it is most unfortunate for the plaintiff, that we could not find any evidence to support the allegations as
C particularised in the above-said para 10 of the statement of claim. As such the alleged facts to support claim for damages remained unproven.

[28] Eventhough, there was a piece of evidence to indicate the effect of the
D credit information on another financial institution, the Overseas Union Bank, Jalan Imbi branch, Kuala Lumpur; such information did not adversely affected the plaintiff's loan application. The branch manager of the Overseas Union Bank, PW3 testified that after due diligence, the bank proceeded to grant the loan to the plaintiff.

E

[29] There is no evidence adduced in respect of the rejection of the plaintiff's credit card application by Citibank on or about December 1993, as alleged in para 10(a) of the statement of claim. Likewise, the rejection of the plaintiff's application for financial facilities by Hong Leong Finance Bhd on or about
F December 1996 was merely by the production of a letter of rejection (exh P9). Upon perusal of the exh P9, we found that there was insufficient material or particulars in the said letter to indicate that such rejection was due to any credit information supplied by the defendant. No witness was called to explain on the rejection. There is no evidence to show any nexus between the letter of
G rejection, exh P9, and the defendant.

[30] Due to unproven facts as alleged in para 10 of the statement of claim, on a balance of probabilities, we find that the plaintiff has failed to prove that he
H had suffered damages as a result of the libel.

CONCLUSION

[31] For the above reasons and findings, we unanimously conclude that:

I

(a) on the first issue on whether the words published are defamatory, the answer is in the positive; and

(b) on the second issue on whether the plaintiff had suffered damages as a result of the libel, the answer is in the negative.

[32] In view of the above conclusions, we therefore partly allowed the appeal with costs. Our judgment, as pronounced in court reads as follows:

> Appeal is allowed to the extent that the findings of the Learned High Court judge on the issue of libel are set aside, but the dismissal of the claim is upheld. The order of costs in the High Court is set aside. Costs for this appeal is fixed at RM20,000, payable to the appellant.

Appeal allowed in part.

Reported by Ashok Kumar